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THE PUNISHMENT DEBATE

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> I warn you to stay unswerving to your task—that of standing by the man on the firing line—the practical, hardheaded, experienced honest policemen who have shown by their efforts that they, and they alone, know the answer to the crime problem. That answer can be summed up in one sentence—adequate detection, swift apprehension, and certain, unrelenting punishment. That is what the criminal fears. That is what he understands, and nothing else, and that fear is the only thing which will force him into the ranks of the law abiding. There is no royal road to law enforcement. If we wait upon the medical quacks, the parole panderers, and the misguided sympathizers with habitual criminals to protect our lives and property from the criminal horde, then we must also resign ourselves to increasing violence, robbery, and sudden death.[1]

> But [destroy] is just what we do with so many people who, if they had the proper capacity to respond to the threat of punishment, would not have gotten into trouble in the first place. We commit a very grave error when we punish those who do not learn from punishment. Not unexpectedly, our error is clearly reflected in the creation of a class of hopelessly recidivistic criminals.[2]

THESE TWO STATEMENTS, the first by J. Edgar Hoover and the second by Judge David L. Bazelon, demonstrate elements of a debate which has continued for many years with the same vehemence and the same citation of social phenomena to support opposite conclusions. The debate is not between the Federal Bureau of Investigation and the federal Judiciary. Police officials are sometimes found who support the statement of Judge Bazelon, and

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1 Hoover, "Patriotism and the War Against Crime," address given before the Daughters of the American Revolution annual convention, Washington, D.C., April 23, 1936, quoted in Gray, *Criminology: The Treatment-Punishment Controversy*, 4 Wm. & M. L. Rev. 160, 160-61 (1963).

2 Bazelon, *Law, Morality, and Civil Liberties*, 12 U.C.L.A.L. Rev. 13, 16 (1964).

judges may be found making statements supporting that of Mr. Hoover, although probably not as unrestrained. The debate is one which cuts across law with hot emotion, coloring, not only administration of prisons, but also the determination of who should be considered criminal. The debate is, of course, how society should handle the violators of its criminal laws. The views represented above are those of the supporters of retribution and the supporters of rehabilitation, the major antagonists in the debate today.

In this paper, I shall attempt first to briefly review the history of penological theory and practice as it bears on the modern debate, second to summarize the positions and criticisms of the antagonists, and finally to draw some conclusions.

The Historical Background

The oldest and, at least until the last two hundred years, most generally respected theory of punishment has been the *lex talionis* — "an eye for an eye and a tooth for a tooth." This principle, which entered Western thought through the Mosaic legal tradition, first appeared in the Code of Hammurabi. As early applied, the *lex talionis* was administered equally to intentional and unintentional injuries, a feature not uncommon in primitive legal systems.[3] Its purpose was two-fold: an endorsement of measured retaliation and an attempt to do equity between the offender and the victim.[4] It is perhaps in the purpose of doing equity between the parties that the principal confusion associated with application of the *lex talionis* entered Western thought in the Middle Ages. While retaliation was measured by this rule, it was early perceived that it would not necessarily be equal to the offense. One qualification added to the apparent certainty of the rule was founded upon the difference in social station between the parties—the eye of a serf did not seem to equal the eye of a lord.[5] Also, there are no equivalent reactions to theft, blasphemy, slander, rape, or the many forms of fraudulent crimes. Partly for these reasons, "an eye for an eye" came to be used as justification for the cruelest and most disproportionate of punishments, particularly in the late Middle Ages.

3 Korn and McCorkle, Criminology and Penology 378-81 (1959). To mitigate harsh effects the Jews established cities of refuge for the accidental offender: *Deuteronomy* 19:4-6.

4 Korn and McCorkle, *supra* note 3, at 377.

5 *Ibid.*

To the uncertainties of the *lex talionis,* men in the Middle Ages added features characteristic of the day. Social self-preservation and religious fervor provided the most persuasive justification and measure of punishment. Evil was to be battled with all of the energy the God-fearing might muster. Punishment was viewed as natural and necessary. There were, of course, some exceptions. Among the Germanic tribes of the early Middle Ages, there were systems of assigned monetary values for injuries or death known as the *wergild.* When capital or corporal punishment was administered, it was relatively humane.[6] Also, a few counsels of moderation were to be found, such as Venerable Bede, who urged that the church at least should punish for ecclesiastical crimes only as a parent would his erring child.[7]

Modern theories of punishment may be traced from the Classical Criminologists of the Eighteenth Century. This was a day of growing humanitarianism. Tyranny was becoming the great enemy of intellect, and individualism the new ideal. This was the age of Montesquieu and Rousseau: the Age of Enlightenment.

The first writer of this age to turn his attention to the question of punishment was Cesare Beccaria, an Italian aristocrat who, in 1764, published an essay which earned immediate acclaim.[8] Basing his ideas upon the Social Contract theory of Montesquieu, Beccaria viewed punishment as a necessity in preserving the society formed by the contract. Any punishment exceeding the minimum necessary to preserve society, he said, was tyrannical. The purpose of punishment being something other than total retaliation, Beccaria concerned himself with the limits and consistency of punishment. The amount of punishment, he felt, should be defined by the legislature, and the courts left without discretion. Further, the legislature should determine this according to two factors: the destructiveness of the crime to public safety and happiness, and the inherent inducements present in the crime. Developing the second factor, he observed that as punishment became more certain, it

6 See *id.* at 384-89.

7 Bede, *Ecclesiastical History of the English Nation,* in Readings in Jurisprudence and Legal Philosophy 358 (Cohen and Cohen ed. 1951).

8 For a discussion of Beccaria's essay, see Monachesi, *Pioneers in Criminology—Beccaria,* 46 J. Crim. L. C. & P.S. 439 (1955). See also Beccaria, Essay on Crimes and Punishment in *Readings in Jurisprudence and Legal Philosophy* 346 (Cohen and Cohen ed. 1951).

should become milder. Making punishment excessively cruel tended, he felt, to brutalize men. Cruel punishment also encouraged crime by causing an offender to use the most extreme forms of violence in order to escape detection. He felt the death penalty more punitive than is ever necessary.

Beccaria's essay was the first major endorsement of deterrence as an objective of criminal sanctions. This is demonstrated by his hedonistic system of determining the extent of punishment and by his very justification of punishment in the contractual society. His theory is utilitarian and humanitarian. Yet, in his advocacy of complete equality in punishment, Beccaria did not necessarily discard the *lex talionis*. His argument should be viewed in the context of a day when the punishment for knocking out a tooth would generally far exceed giving up one's own tooth. Yet, the *lex talionis* was to be secondary. Beccaria was endorsing the intellectual fashion of the Montesquieu-Rousseau day: reason, equality and individualism.

Roscoe Pound frequently commented upon the impact of this fashion on Twentieth Century legal thought. This fashion, which became a part of the Puritan influence, later stood in the way of individualized handling of convicted prisoners.

> It expresses the feeling of the same self reliant man that neither the state nor its representative, the magistrate, is competent to judge him better than his own conscience; that he is not to be judged by the discretion of men, but by the inflexible rule of the strict law.[9]

Such considerations of extreme individualism were carried by Kant and Hegel to direct support of the *lex talionis*. While the writings of these two philosophers were important in the development of penological thought, they have had little direct effect upon Twentieth Century penal practices. Kant felt that the punishment should approximate natural punishment as closely as possible, and that it should never be considered a means to another end—either with regard to society or to the criminal himself.[10] The appropriate and equal punishment should automatically follow as an exact reaction to the crime. While Hegel showed less admiration for the mechanics of the *lex talionis*, he agreed with Kant's view that pun-

[9] Pound, The Spirit of the Common Law 50, 51 (1921).

[10] Kant, *Philosophy of Law*, in Readings in Jurisprudence and Legal Philosophy 320-23 (Cohen and Cohen ed. 1951).

ishment was contracted for by the criminal, and that the criminal, as an independent free agent, was entitled to have the contract performed by society.[11] Thus, to Kant and Hegel, deterrence was a desired by-product of the contract, but not a central purpose.

Jeremy Bentham, on the other hand, picked up and developed the utilitarian arguments of Beccaria.

> Montesquieu perceived the necessity of a proportion between offenses and punishments. Beccaria insists upon its importance. But they rather recommend than explain it; they do not tell in what that proportion consists. Let us endeavor to supply this defect, and to give the principal rules of this moral arithmetic.[12]

Applying his pleasure-pain calculus, he felt that the pain of the punishment should just exceed the pleasure of the crime. While he paid lip service to *lex talionis*, he felt that it was of advantage only where it would help impress the reason for punishment upon the offender's mind. He further felt that this might involve looking into internal causative motives rather than simply the external offense.[13] Bentham also believed that punishment should be subject to comparison and measurement, and should be remissible or revocable.[14] For these reasons he believed that imprisonment should be the primary form of punishment.

Later writers have criticized Bentham and the other Classical Criminologists for talking about crime without talking about the criminal. By considering crime a bargain which criminal law can prevent by making it unprofitable, critics say Bentham failed to understand the true motivation of the criminal.[15] In spite of such criticisms, the impact of the Classical Criminologists was strong. Under their humanitarian influence, prisons for the first time became the primary method of punishment.[16]

In Europe before the Eighteenth Century, imprisonment was not considered a punishment, but rather a means of detention pending trial or execution of punishment.[17] The principal forms of

11 Hegel, *Philosophy of Right*, in Readings in Jurisprudence and Legal Philosophy 325 (Cohen and Cohen ed. 1951).

12 Bentham, The Theory of Legislation, 324-25 (Hildreth trans. 1931).

13 *Id.* at 337.

14 Geis, *Pioneers in Criminology—Bentham*, 46 J. Crim. L., C. & P.S. 159 (1955).

15 *Ibid.*

16 See Tappan, Crime, Justice and Correction, 585-90 (1960) for a discussion of the influence of the Classical Criminologists upon the developing penal system.

17 *Id.* at 593-95.

punishment, in addition to the death penalty which was frequently grotesquely executed, were transportation and various corporal punishments, from flogging to branding and mutilation.[18] It is not particularly surprising that early societies do not consider imprisonment a punishment. Where life at freedom is hazardous at best, and the individual can rarely be certain of having enough food or escaping his enemies, natural or human, placing him in a secure shelter and providing him with food can hardly be universally viewed as a misfortune. Peter Freuchen illustrates the point. An Eskimo was convicted of killing a dishonest white trader. When he was sent to a Canadian prison to serve his sentence, his father insisted that the son was being rewarded for his beneficial deed.[19]

In addition to popularizing imprisonment as the principal form of punishment, the Classical Criminologists introduced other features which are still present in our penal laws. Beccaria's plan of uniform sentences established by legislatures with no modification by courts is yet with us in form, although tempered by the later influences of the neo-Classical and Positive movements in penology. Further, the free will view of punishment which was given philosophical support by the Classical Criminologists controls the penal systems of today, in spite of the general popularity of deterministic explanations of behavior. Probably, no school of penology has had as much direct influence on today's prison systems.

Following the writings of the Classical Criminologists, it would be possible to discuss the many and significant contributions of such prison reformers as John Howard and Captain Alexander Maconochie. Their contributions, while having effects upon modern theories, were principally toward more humane prison administration.[20] The next principal figure having profound effect upon penological theories was Cesare Lombroso.

In the Nineteenth Century, Western thought was undergoing profound changes. The Industrial Revolution was in full bloom, and with it came a new reverence for science. In addition to the increased popularity of natural science, thinkers increasingly turned

18 See Barnes, The Story of Punishment (1930).

19 Freuchen, Book of the Eskimos (1961).

20 For a discussion of these reformers and the development of prisons from the eighteenth century to the present, see Barnes, *supra* note 18 at 113-49.

the method to the study of man. Darwin, in 1859, published his *Origin of Species*, which took man out of the center of the universe as surely as Copernicus had earlier taken the earth out of the center. Man was a physical being with a mind controlled by a body, and a body controlled by its origins.

In 1864, Lombroso, then an Italian army doctor, began observing differences in appearance between honest soldiers and their more vicious comrades.[21] Pursuing this further, he started studying criminals in Italian prisons. His central theory was formed when, while performing a post-mortem examination on a famous criminal, he noticed certain features common in lower animals, but not in man.

> This was not merely an idea, but a revelation. At the sight of that skull, I seemed to see all of a sudden, lighted up as a vast plain under a flaming sky, the problem of the nature of the criminal—an atavistic being who reproduces in his person the ferocious instincts of primitive humanity and the inferior animals.[22]

Lombroso later found that additional factors seemed to be involved. Over the years, to his atavistic or "born criminals," he added epileptics, moral imbeciles, criminaloids—ones with partial atavistic characteristics but not to the degree of "born criminals"—and finally normal persons who commit crimes under passion. Thus, while never abandoning his first theory, he acknowledged additional factors and even described sociological factors in his later writings.

Today, the theories of Lombroso are in disrepute, particularly in England and the United States. It is perhaps significant that the measurements of Lombroso and his many students were themselves principal factors in bringing the atavistic theory to the ground. As scientists, they were conscientious enough to continue testing their theory, which resulted in continually extending their list of atavistic characteristics. As the list thus grew, George Bernard Shaw observed that the criminal characteristics " . . . are as characteristic of the Church, the Stock Exchange, the Bench, and the Legislature as of Portland and Dartmoor."[23]

21 See Wolfgang, *Pioneers in Criminology—Lombroso*, 52 J. Crim. L., C. & P.S. 361 (1961).

22 Quoted *id.* at 369.

23 Shaw, The Crime of Imprisonment, 106 (1946).

The principal importance of Lombroso today, however, is not in his criminological theories, but in his application of determinism and the scientific method to the discussion of criminal behavior and penal treatment. Lombroso and his followers became known as the Positive School, a name retained today by behavioral scientists who aline themselves with theories of rehabilitation. Lombroso organized congresses of criminal anthropology, which became clearinghouses for exchange and dissemination of information in criminal aspects of sociology and psychology as well as criminal anthropology. An offshoot of these congresses was the American Institute of Criminal Law and Criminology, of which Professor John Wigmore was the first president, and the *Journal of Criminal Law and Criminology*, the official publication.[24]

The members of the Positive school differed from those of the Classical school in several significant ways. Their study, whether in criminal anthropology, psychology or sociology, was concerned with the criminal himself and not with the crime or with society in general. Further, they professed a non-moral, scientific approach, which viewed behavior as the product of certain exterior forces. These forces might be social, psychological or physiological, depending upon the discipline. Man's exercise of free will was discarded by the Positivists, partly because it was an immeasurable variable, and partly because by the very terms of their disciplines they were led to deny entirely that free will existed.[25]

When such deterministic positions came to be applied to questions of punishment, the conclusions were revolutionary. Lombroso himself did not dissent from the basic proposition of Beccaria that society had a right to punish as a social necessity.[26] Thus, he did not question the need for deterrence, nor the efficiency of punishment as a deterrent, with the exception of the "born criminal," whom he felt required permanent incarceration or execution. After the first need, that of social protection, Lombroso believed that individual centered rehabilitation should be applied, and that to facilitate this, indeterminate sentences should be given.

Those who followed Lombroso did not necessarily follow his

24 Wolfgang, *supra* note 21, at 366.

25 See Radzinowicz, *Ideology and Crime: The Deterministic Position*, 65 Colum. L. Rev. 1047 (1965).

26 *Supra* note 21, at 385-87.

view of social necessity. They often applied deterministic concepts to the principle of responsibility under traditional criminal law, and argued that, since offenders are not motivated by free will, society has no moral right to punish them. Such remains the position of the liberal psychoanalytic branch of the Positive school today.

After the fall of criminal anthropology from intellectual fashion around the turn of the century, its direct heir was the relatively young science of criminology, a subdivision of sociology. Its position as an included field within the confines of the discipline of sociology has, according to some writers, hampered its development by obstructing interdisciplinary investigation.[27]

While not a direct heir in organizational terms, the emerging world of psychoanalysis assumed much of the intellectual position of criminal anthropology.

The Debate Today

The current debate on penological theory is one of the more emotional current "learned" controversies. Even an attempt to impartially review the debate is frustrated by the flow of emotionally charged verbiage. A significant portion of the debate is inevitably directed toward the proponents of other views. Thus, the psychiatrist may dismiss lawyers as mystical hypocrites:

> In modern trials the concept of abstract justice is invoked as the single aim of the proceeding, but the proceedings themselves can be no other than a cover of the desire to win the contest. . . . The desire to win the contest is the archaic, agonistic element for which in academic circles the term "adversary" is a mere euphemism.[28]

He may summarily dismiss the statistical macrotechnique of the criminologist:

> It is this trend in our civilization that is fundamentally responsible for the birth of the newer psychology, which looks into the psychological depth of man and is inclined to disregard the worship of averages that never lead to the individual, still less permit us to gain any insight into his depth; there is no depth in a common denominator.[29]

Prominent criminologists may be found condemning psychia-

27 Geis, *Sociology, Criminology and Criminal Law*, 7 Social Problems 40 (1959).
28 Roche, The Criminal Mind, 73 (1958).
29 Zilboorg, The Psychology of the Criminal Act and Punishment, 101 (1954).

try in equally emotional terms: "This neo-Lombrosian theory, declares criminals to be psychopathic, and when one psychopathy proves to be inadequate as an explanation of crime, it merely retreats to another psychopathy."[30] Another criminologist contrasted scientific method with that of courts, which are governed " . . . by theologico-metaphysical concepts derived from antiquity and the Middle Ages that have no more scientific standing and validity than witchcraft, astrology and alchemy."[31]

The attitude of lawyers toward the behavioral disciplines is likely to be one of indulgent superiority, particularly toward their lack of agreement and the psychiatrists' colorful terminology:

> Nowadays less is heard of cures, treatment and drugs—more of guidance which to a judge who has watched the wobblings over the years sounds as if the psychiatrists are lining themselves up with the moral theologians.[32]

A court summarily disposed of psychiatric objections to the M'Naughten rule by saying:

> [I]t may be noted, that Freudian psychiatrists tend to discount the existence of the capacity in the individual to exercise his free will. Perhaps it should be noted also that there are other schools of psychiatry beside the Freudian. It is not for the lawyer to decide between these schools. We can only wish all of these learned men success in their quest for knowledge in a new field.[33]

The principal opponents in the debate are those supporting the theory of rehabilitation and those supporting retribution. On the outside, but always a part of the debate, are those primarily concerned with deterrence and those, such as Holmes, who see any punishment as a justifiable self-preference of society although not measured by any theoretical standard—a response to a felt necessity.[34] The opponents in the rehabilitation vs. retribution debate are likely to direct part of their debate to the gratification of the purposes propounded by the outsiders and, equally, the purposes of the outsiders will be served by the methods debated by the principle antagonists. Most criminologists cannot be said to be advocates of a theory so much as battle-weary veterans who, while they

30 Sutherland and Cressey, Principles of Criminology, 117 (1960).

31 *Supra* note 18, at 275.

32 Lawton, *Psychiatry, Criminology and the Law*, 5 Medicine, Science and the Law 132, 133 (1965).

33 State v. Andrews, 187 Kan. 458, 469, 357 P.2d 739, 747 (1960).

34 Holmes, The Common Law Lecture II, *The Criminal Law.*

once supported a theory of rehabilitation, are no longer confident that crime or criminals can be "cured."[35] Nevertheless, they hope to remain neutral in the battle between the principal antagonists and to provide humane contributions if not divine solutions. Such desires were articulated by McCorkle and Korn:

> It is the tragedy of modern correction that the impulse to help has been confused with treatment and seems to require defense as treatment. One of the more ironic difficulties with this position is that when one makes "rehabilitation" the main justification for the humane handling of prisoners, one has maneuvered oneself into a position potentially dangerous to the humanitarian viewpoint. What if humane treatment fails to rehabilitate—shall it then be abandoned? The bleak fact is that just as the monstrous punishments of the eighteenth century failed to curtail crime, so the mere humane handling of the twentieth century has equally failed to do so.[36]

The advocates of rehabilitation start with the basic proposition of determinism.[37] Alongside this view is placed the concept of responsibility as it is contained in the criminal law. This concept is a part of the basic moral principles of *mens rea* as adopted by the law.[38] For this reason, a frequent means of argument used by psychiatrists supporting rehabilitative theories has been through discussion of the limitations of the M'Naughten rule. This attack upon the moral basis of the criminal law best employs the skills of the psychiatrist. By showing that offenders are not free to conform their actions to the requirements of the law, the question of "guilt," for which "punishment" is the result, is bypassed entirely. This, however, does not exhaust the rehabilitative approach. While some psychiatrists assert that by definition all criminal offenders are mentally ill, most psychiatrists do not believe that all crimes are products of mental illness.[39]

Outside the question of responsibility, supporters of the ideal of rehabilitation, including the psychiatrists, have been fully as subjective as the supporters of any other school. Certainly no demonstrated method of treatment has had significant statistical effect.

35 *See, e.g.*, Toby, *Is Punishment Necessary*, 55 J. Crim. L., C. & P.S. 332 (1964); *supra* note 1; and *supra* note 16, at 237-72.

36 Quoted in Korn and McCorkle, *supra* note 3 at 474.

37 Hall, General Principles of Criminal Law, 138-68 (1947).

38 Psychiatrists prefer to avoid free will vs. determinism debates, however, see *e.g.* Sadoff, *Psychiatric Involvement in the Search for Truth*, 52 A.B.A.J. 251 (March, 1966).

39 *Supra* note 29, at 43.

Psychiatry is yet a young and imprecise science. In speaking of psychoanalysis, Sutherland and Cressy made the following criticism:

> The major difficulty with such a theory is the fact that the variables cannot be studied scientifically. There is no way to prove or disprove the theory, for the elements of it cannot be observed or measured. From the point of view of a non-believer the symbolism often is fantastic, and the psychoanalysts have no way of demonstrating the relation between the symbols and the things they are supposed to represent. Since the psychoanalysts beliefs and opinions can scarcely be distinguished from their research, they can only try to convert the non-believer into one of the faithful. Moreover, one who argues that psychoanalytic theory is scientifically invalid in many respects is sometimes psychoanalyzed by the defenders of the theory, on the assumption that he himself must necessarily be expressing some deeply hidden secret, emotion conflict rather than a worthwhile criticism. Such a practice can scarcely lead to the development of a sound body of knowledge regarding crime and criminality.[40]

Paul W. Tappen, another criminologist, is considerably more restrained in his discussion of the progress of psychiatry and psychiatric social work in penology, but he does observe that " . . . *ad hoc* empiricism, is wasteful and unscientific."[41]

Statements by supporters of rehabilitation have been based upon generalized optimism in which crime is viewed as an "illness" and the problem one of locating a "cure." Perhaps this optimism is best shown by Gregory Zilboorg, a psychiatrist:

> I, for one, do not feel at peace with this multivolumed and multivoiced impotence, and I do not wish entirely to bow to the desperation with which the public and the law seem to cling to the ancient principle of *lex talionis,* whether you call it retribution, or paying one's debt to society, or "serving one's time." . . . . And second, whatever method may be considered most advisable, it is obvious that the criminal must be set aside from the rest of us and treated differently from the rest of us. He has a moral responsibility to meet, a sin to expiate, and a job of self-rehabilitation to perform with the help of the enlightened law and its administrators. Moreover, he has a sort of unwritten duty to discharge—the duty to disclose the psychological secret which is his as a criminal, and which he for the most part does not know himself unless helped to learn and then to teach us.[42]

While the advocates of rehabilitation have not been as successful as they might have hoped in discovering a scientific method of

40 *Supra* note 30, at 134-35.
41 *Supra* note 16, at 538. See also *supra* note 3 at 250-72.
42 *Supra* note 29, at 31-32.

rehabilitation, they have, together with others, been successful in demonstrating weaknesses in the hedonistic theory of the Classical Criminologists and of punitive systems of justice. They have shown that not everyone weighs the advantages of his actions against their disadvantages before forming an intent to act. The psychiatrists' principle contribution to the question of legal responsibility has been directed toward demonstrating the fallacy of such an assumption.[43] Some persons certainly do weigh consequences and act according to the conclusion reached, but this does not mean that all will or can. As Judge Bazelon pointed out, the recidivist has almost by definition demonstrated that he is incapable of making this determination.[44]

The result of administering punishment to those who, for one reason or another, are incapable of learning from it is all too often the formation of a "contraculture."[45] This contraculture, or criminal culture, has its own controls over its members and tends to perpetuate antisocial values and conduct. In the prisons themselves, this contraculture may have more influence upon inmate behavior than anything the prison administration can do, thus itself tending to frustrate attempts to make the institutions more democratic and humane.[46] The contraculture generally also provides its own educational system under which offenders may learn techniques of criminal activities which will make detection more difficult and crime more lucrative.[47]

Aside from the contraculture, imprisonment is an ostracism from society. The result of such ostracism is to remove the offender from models and examples of desired conformity. Such ostracism, if it is believed to be unjustified or too harsh, may also result in feelings of hate and desires for revenge against the society which the offender believes mistreated him.[48] Further, the punished offender may develop attitudes which obstruct efforts to successfully return to society. The time spent in the isolation-without-privacy of a pe-

43 For a statement of the position taken by psychiatrists in the question of responsibility, written in terms more understandable to lawyers, see Weihofen, The Urge to Punish (1957).

44 *Supra* note 2.

45 *Supra* note 35.

46 See *supra* note 3, at 512-530.

47 *Supra* note 30, at 317-18.

48 *Ibid.*

nal institution often leads to a lack of self-respect and initiative and to an attitude of mistrust.[49]

Critics point out that under our present penal laws, most punished offenders, no matter how incorrigible, no matter how incapable of living in non-institutional society, no matter how certain to commit further crimes, will certainly one day return to open society. This has led many advocates of rehabilitation, tacitly conceding that they probably could not "cure" all offenders, to advocate indeterminate sentences, which means that the incorrigible would be permanently isolated from society. Some of the implications of this argument will be discussed later.

But even the offender who is not incorrigible may leave the prison without a healthy feeling of guilt for the crime he committed. He is likely to feel that he has "paid the price" and that the board is now clean. He will find, however, that not all members of society share his attitude. The ostracized are not always received with open arms; vengeance does not quickly change to love after the punishment is administered. If the released offender has escaped hatred for society while in prison, he may develop it when he finds that society does not always acknowledge that he has "paid the price" and that his crime is a contract terminated by performance.[50]

Supporters of the use of indeterminate sentences also point out that the time when an offender may best be returned to society may not accurately be determined in advance. If he remains institutionalized after he is equipped to return to society, he may, under the best of circumstances, become dependent upon the institution and ill equipped for the rigors of living in free society.[51]

Critics of punitive justice also assert that punishment administered in a brutal or extreme manner, including capital punishment, may brutalize members of society and itself lead to greater criminality.[52]

I earlier quoted Dr. Gregory Zilboorg to show the optimism of those advocating rehabilitation that a "cure" for crime can be dis-

49 *Ibid.*
50 See Alexander, *The Philosophy of Punishment*, 13 J. Crim. & C. 240 (1922).
51 See Barnes and Teeters, New Horizons in Criminology 587-92 (3d ed. 1959).
52 See *supra* note 29, at 96.

covered. The reverse side of this coin is a certain revulsion at the idea of causing one's fellow man to suffer. Morris R. Cohen said that " . . . back of all the arguments against the right or duty of punishment is the natural and just, if inadequately formulated, resentment against the stupid and ineffective cruelty of our whole penal system.[53]

Those who contend that retribution, and not rehabilitation, must be the primary purpose of the criminal law, have not in recent years usually justified their contentions on moral beliefs in free will and retaliation alone. They have also justified it in terms of deterrence. They have pointed out that, while perhaps the threat of punishment does not deter everyone, it does deter most people most of the time. Thus, as a judge expressed it:

> It is to be hoped that all of you keep the law because your moral consciences impel you to do so—but your consciences are very probably strengthened (as mine certainly is) by the knowledge that a breach of the law followed by detection would have disastrous consequences outweighing any momentary gain.[54]

On a similar theme, Cohen elaborated upon the assertion sometimes advanced that morality deters more than criminal laws or the threat of formal punishment. He said that

> [I]n a heterogeneous society, where diverse moral standards prevail and where conditions are rapidly changing, the temptation to depart from the hitherto accepted ways rises rapidly; and the fear of social disapproval decreases even more rapidly when we associate only with those who have the same inclination that we have.[55]

The principal article of faith for those who support retribution as the purpose of punishment is that reprobation is a natural human desire and that if the law does not punish, victims and their sympathizers may seek vengeance outside the orderly process of the law.

> [The retributive theory] contains an element of truth which only sentimental foolishness can ignore. The sentiment that injuries should be avenged still prevails in the relations between nations and cannot be ignored within the life of any community. The problem of enlightened social morality is not to suppress the natural desires of human beings. Such suppression may itself be vain or cruel. Morality should aim to eliminate or minimize the brutality of natural vengeance or such results as would breed

53 Cohen, *Moral Aspects of the Criminal Law*, 49 Yale L.J. 987, 1007 (1940).
54 *Supra* note 32, at 138.
55 *Supra* note 53, at 1016-17.

> more general evil than the suffering of any particular injury.
>
> If the natural desire for vengeance is not met and satisfied by the orderly procedure of the criminal law we shall revert to the more bloody private vengeance of the feud and of the vendetta. We must remember that lynch law is not a recent American invention but rather the primitive form of public justice, and that the formal procedure of the criminal law is only a more rational expression of this primitive demand. The criminal law deals not with a kingdom of heaven but with actual men and women of flesh and blood living on earth.[56]

If the unifying belief of supporters of rehabilitation is that a cure for crime can be found, this is the unifying belief of the supporters of retribution, with the possible exception of those who endorse punishment solely because of its supposed deterrent effect. Perhaps as a corollary of this view, some say that society must have a method of expiation. Conforming members of society must give vent to their wrath and, by doing so, purge themselves of their own desires to commit acts prohibited by law by making such acts unprofitable and thus desirable.[57] It is in this feature that perhaps the greatest emotions lie:

> Indeed, we must hate evil if we really love the good. (Undiscriminating love extended to everyone is nonsense.) We must hate evil intensely if we are to fight it successfully. . . . It is thus impossible not to be indignant against certain criminals or not wish to punish them.[58]

The principal object of concern for the advocate of retribution is society. His statements will emphasize the needs of society and the emotions of the victim of crime, just as the Positivist will give his attention exclusively to the individual offender. To say that loving good is hating evil is to leave little justification for consideration of the welfare of the individual offender. It would authorize the most savage of punishments if by thus demonstrating hatred of evil one could fight it more effectively. Most writers in support of retribution today do not, of course, endorse harsh punishment. With the possible exception of the expiatory justification, nothing in the argument in favor of retribution carries with it a logical measurement of the quantity of punishment. It is this feature which many criminologists and others intent upon locating a middle ground between the extremes of retribution and rehabilita-

[56] *Id.* at 1011-12.
[57] *Id.* at 1017 and *supra* note 35.
[58] *Supra* note 53, at 1018. Psychiatrists seem to agree: see Roche, *supra* note 28.

tion hit upon. Thus, while agreeing that retribution to some degree may be socially necessary, they say it may be served by a minimum of deprivation—perhaps just the detention necessary for rehabilitative treatment.[59] On the other hand, they point out, punishment may in itself be effective in rehabilitation.[60] Just as punishment is indispensible in the training of a child, they say, so it is in the rehabilitation of a criminal.

As might be expected, much of the writing tending to support retributive justice has been directed toward the weaknesses in the positions of those supporting rehabilitation. Thus, the supporters of retribution have constantly pointed out that the cause of crime has not been discovered and that rehabilitation has not been demonstrated to be possible on any significant scale. They also attack the theoretical bases of the Positive argument.

Critics of the Positive theory first point out that any hope for the wholesale eradication of crime must of necessity be futile. Most elements of personality leading to crime are different from those of the normal members of society only in degree. Thus, Pound suggested that a primary factor in high American crime rates as well as in its high degree of financial wealth is its pioneer tradition of fierce individualism.[61] This individualism has been accompanied by an admiration of aggressive initiative, financial success, and social and geographical mobility.[62] Such fierce individualism will be reduced as a factor in crime only as society matures and individualism is tempered.[63] The pioneer tradition is not the only factor leading to crime, but it demonstrates that a reorganization of society and its values would be necessary to eliminate crime. The problems presented are also demonstrated by one writer in a hypothetical which is perhaps not too improbable. Suppose, he says, that a drug is developed which inhibits an essential feature of most crime—nonconformity:

> Would it then be legitimate to authorize the use of the drug even as a means to prevent recidivism, let alone as a general preventive measure for the whole population, or those thought likely to com-

59 *Supra* note 35.
60 *Ibid.*
61 Pound, Criminal Justice in America, 135-41 (1930).
62 *Supra* note 30 at 82-96.
63 *Ibid.* See also Powell, *Crime as a Function of Anomie*, 57 J. Crim. L.; C. & P.S. 161 (1966) in which the author shows a long-range decline in violent crime rates.

> mit crimes? Would its application in such circumstances not impoverish the community in which we live to a greater extent than the evil which it seeks to eradicate?[64]

While the problem of crime is serious, the number of serious criminals is yet proportionately small, and many would feel that there are values in a free society which are to be more highly prized than the elimination of crime.[65]

Another criticism, or sometimes qualification, of rehabilitation frequently raised is that of cost. Some critics, of course, begrudge any money given to other than simple detention of offenders. A more serious issue is raised by those who would draw attention to the cost of rehabilitation relative to the free community. The treatment, they say, should never appear to be a reward. Thus, if effective rehabilitation were to require a college education, the convicted offender should never be rewarded with a scholarship while members of the noncriminal society with equal ability are deprived of a similar education because of poverty.[66]

In addition to criticisms directed to the theoretical implications of rehabilitation, much has been aimed at methods advocated, and the competency of Positivists to perform the tasks which they propose. Most of this has been directed against the psychiatrists.

One criticism of psychiatry is that too often it is applied to criminals as though they were conventional neurotics or psychotics. Critics point out that most psychiatrists seem to agree that there are about the same rates of coventional mental illness in prison as out. Under these circumstances, methods of psychoanalysis may be at cross-purposes with the social need in treating the violators of society's laws. This is explained by Paul W. Tappan, a criminologist:

> It is not a specific objective of the criminal law or the correctional system to alleviate the mental or emotional distress of offenders . . . . The ends of deterrence, incapacitation, and rehabilitation must be sought through widely varied methods and in some instances, at least, the result should be to increase the frustrations and guilt feelings of those who are criminally inclined.[67]

Further, since the "patients" in a prison are not voluntary, they frequently seek psychiatric services for purposes other than genu-

64 Hadden, *A Plea for Punishment*, 1965 Cambridge L.J. 117, 124 (1965).
65 See also *supra* note 16, at 528-29; and *supra* note 1 at 167.
66 *Supra* note 53, at 1013.
67 *Supra* note 16, at 523.

ine desires for help in which they will fully cooperate as a voluntary patient would.[68] Some assert that this can particularly be used to the advantage of the erudite offender.[69]

The psychiatrists' view of criminal responsibility has been the subject of voluminous debate. Some mention of this debate was made earlier. That, together with what is mentioned here, cannot be said to completely summarize the positions, much less exhaust the issues. Critics of the psychiatrists have said that the deterministic argument, carried to its logical end, would eliminate crime by definition, but the problem in society would continue and therefore also the need for retribution. Thus, following their retributive positions, these critics argue that the law must consider most offenders responsible and their actions the product of free will. Approaching the issue from a slightly different angle, one writer said, "We do not, and should not, punish offenders just because they are responsible; we punish them to impress upon them that they are responsible."[70] The only exception which the advocates of retribution would make would be for those who are so obviously incompetent that punishment would become functionless.[71] In this debate, as in others, the supporters of retribution have themselves taken a deterministic position. Punishment, they say, may be viewed as one of the elements of one's environment (and a strong one at that) which serves with others to determine one's behavior.[72]

An additional argument used by critics of the school of rehabilitation is directed toward the suggestion, usually made by psychiatrists, that all offenders be given indeterminate sentences, with release determined by a board of behavioral scientists. The critics argue that even in institutions in which rehabilitation is the sole end sought, such as juvenile institutions and even mental hospitals, the initial rehabilitative spirit declines to one which is principally custodial. While the heads of even these institutions may wish to change the inmates, the inmates must be alterable and must desire to be altered before treatment can be effective.[73] Thus, treatment

68 See *e.g. id.* at 705-88.
69 Hall, Studies in Jurisprudence and Criminal Theory, 245 (1958).
70 *Supra* note 64 at 123.
71 See *Ibid.* and *supra* note 53, at 1007-09.
72 *Supra* note 1 at 164.
73 See *e.g. ibid.* and Rubin, Psychiatry and Criminal Law: Illusions, Fictions and Myths (1965).

indeed becomes simply imprisonment. To thus commit offenders to the unlimited discretion of psychiatrists until the offenders are "cured" with no assurance that a "cure" exists or can be applied may be to commit them to imprisonment for life for offenses which may be of relatively small social consequence. Also involved is a question of political and legal philosophy: the rule of law rather than men. Critics argue that so much power in such a small and self-protecting group would be capable of powerful corruption, whether they are called "scientists" or "Philosopher Kings."[74]

Another criticism of rehabilitative theory should also be mentioned, although it is not a subject often raised in the debate between those supporting rehabilitation and those supporting retribution. The problem rather is raised by criminologists and prison administrators. In the early part of the twentieth century, liberal movements generally eased the legislative control over disposition of convicted offenders. As a result of these movements, courts were given greater discretion in the lengths of sentences and the granting of probation. Another result is often considerable discrepancy between various judges in the terms of sentences and the granting of probation on what appear to be similar facts. When no logical reason can be seen for these discrepancies, offenders who have been denied probation or given longer sentences feel that they have been unjustly handled, thus contributing to negative attitudes. It would not appear unlikely that similar attitudes of discrimination may occasionally be found in the noncriminal community. Accordingly, it has been suggested that courts attempt to make punishment and probation more rational and consistent.[75] With inequalities minimized, prisoners would be more inclined to accept punishment as just, and the image of the court as an impartial organ of justice improved.

Conclusions

Oliver Wendell Holmes[76] and Jerome Hall[77] have effectively pointed out that no single theory of punishment, exclusively followed, much less carried to its logical end, would completely satisfy our sense of justice. If rehabilitation were our declared single goal,

74 *Supra* note 69, at 273.

75 See Manheim, *Some Aspects of Judicial Sentencing Policy*, 67 Yale L.J. 961 (1958); and Williams, Sentencing in Transition, Criminology in Transition (1965).

76 *Supra* note 34.

77 *E.g. supra* note 69, at 242-47.

we nevertheless would not feel content in simply releasing persons who have committed serious crimes, but releasing those who would not be likely to commit the crime again. Examples of this may be found in cases of wartime treason, where the prosecuting government has subdued the enemy which the traitor was serving. An instance of this is the case of Ezra Pound, who was prosecuted after the fascists of Italy were defeated.[78] Another example, on the international level, is punishment of defeated enemy officers for war crimes where the army which made such crimes possible is in total defeat, as in the instance of Germany. An example closer to the normal legal situation might be the murderer whose crime is frequently caused by an accidental combination of circumstances and emotions which are unlikely to ever repeat themselves. Many people would consider it unjust to release such a person while an unreformed alcoholic who supports his intemperance by petty thefts spends years—or even his entire life—in detention. Classical ideals of equality and proportion continue to exert strong influences upon modern ideals of what is just.

Turning from rehabilitation to retribution, it is quite apparent that most people would not feel it just to follow this theory to the exclusion of others. Such would stand in opposition to much of the religious and moral teachings by which most people at least desire to live, together with the collective spirit of altruism common in twentieth century Western societies. Further, followed exclusively, it very likely would require as in the Middle Ages that the offender, one removed from society, be permanently isolated. Such a result would not even require punishment as extreme as that used in the Middle Ages. Any ostracism unaccompanied by attempts or desires to reintroduce the offender to society would tend to make the offender a permanent outcast. The cost to society of this consequence can be guessed, particularly when the numbers now handled by extrapenal institutions of probation and nonpunitive juvenile procedure (which logically would also be abolished) are added to the numbers of offenders committed to institutions each year.

Even the object of deterrence could not exist in isolation and the results be considered just. If we consider deterrence of the indi-

[78] For a discussion of the Ezra Pound case, see *e.g.* Arnold, The Criminal Trial as a *Symbol of Public Morality* in Criminal Justice in Our Time, 137 (1965).

vidual offender himself, we raise some of the questions presented under the heading of rehabilitation. In addition, suppose it were empirically demonstrated that most offenders can be prevented from repeating their crimes only by incapacitation in the forms of permanent detention (which we have seen may be too costly), capital punishment, or rendering physically or mentally incapable of repeating their crimes through amputation, castration or lobotomy. Such remedies would be considered by most to be extreme.

If, on the other hand, we view deterrence as the preventing of others from committing the offense by our treatment of the offender, we may call into question many issues involving the relationship between the individual and society. We may find that most people would be deterred most surely from committing minor crimes by brutal and public punishment of a scapegoat. Further, to make an example for others, there would be no particular need to distinguish between the competent and the incompetent, or even between the guilty and the innocent.

The point to be gathered from a comparison of the theories of punishment is that each contains an element of truth which, to again quote Cohen,[79] "only sentimental foolishness can ignore." An advantage which theoretical or philosophical discussion contains is that of helping us rationalize and coordinate our motives; to articulate policies which may otherwise only be guessed at by those seeking prediction. On the other hand, such policy abstractions can lead the theorizer to a tyranny of absolutes. In his drive to systemize the "truths" he has discovered into a continuous, consistent, logical construct, he too often can be led to ignore or undervalue factors which inject disharmony into his intellectual composition. When the conflicting "truths" seem to be as contradictory as they are in the criminal punishment debate and seem to point in such opposing directions, the tendency to stand on opposing absolutes is reenforced. The problem of plotting a vector of movement determined by the competing forces is complicated.

The answer, if answer there is, can not be discovered in a theory of absolutes. It can only be discovered in pragmatic, empirical experience. The theoretical debate serves a function in this process

[79] *Supra* note 53, at 1011.

by demonstrating the social desires by which empirical success is to be measured, for success will not be measured by how much it appeals to a single desire, but rather how it appeals to all, or at least to the stronger of social desires. To what extent is it possible to rehabilitate? To deter? How strong is the human desire for retribution and expiation? The answers to these questions are not to be found in a philosophical model or the lawyer's syllogism. They are not even to be found in the psychiatrist's *ad hoc* diagnoses or in public opinion polls or attitude scales.

Modern leaders in criminology and penal administration seem to recognize this need for pragmatic empiricism. They have attempted to leave the field of theoretical combat to concentrate on more homely struggles. Their strongest theoretical ideal appears to be their desire to be humane, an ideal which should not impede their objectivity.

In this objective approach, public support will be necessary. This support must be in the forms of more money and more freedom for limited experimentation, especially directed toward breaking the vicious circle caused by the criminal contraculture.

Much can also be done by the courts, principally in assuring that the adjudicatory process will continue to be objective and consistent. To do this, courts must avoid becoming embroiled in theoretical debate to the extent that their ability to determine truth is obstructed. No system of punishing or treating offenders will be considered just unless the method of determining who are the offenders is considered, not just fair, but also objectively truthful. Without this, any system must of necessity fail.